



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 31, 1995

Ms. Christine T. Rodriguez
Staff Attorney
Legal and Compliance, MC 110-1A
Texas Department of Insurance
P.O. Box 149404
Austin, Texas 78714-9104

OR95-1162

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 36010.

The Texas Department of Insurance (the "department") received an open records request for certain records pertaining to the department's investigation of National Group Life Insurance Company of Illinois ("National Group"). The requestor specifically requests the following types of records from the department's files pertaining to complaints concerning premium rates, denials of pre-existing conditions, and "customary and reasonable charges": the original complaints lodged with the department, records of the investigation, National Group's responses to the complaints, and the ultimate outcome of the investigations. You state that some of the requested records will be released to the requestor. However, you seek to withhold pursuant to sections 552.101, 552.103, and 552.111 of the Government Code certain other records, a representative sample of which you have submitted to this office for review.¹

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the

Section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision.” (Emphasis added.) Article 1.24 of the Insurance Code provides:

The Board is authorized to address any reasonable inquiries to any insurance company or insurance agent, or to the holder of any permit, certificate of registration, or other authorization issued or existing under the authority or authorization of this code, in relation to the company’s, agent’s, or holder’s business condition, or any matter connected with its transactions which the Board may deem necessary for the public good or for a proper discharge of its duties. It shall be the duty of the addressee to answer such inquiries in writing not later than the 10th day after the date the request is received. *A response made under this article that is otherwise privileged or confidential by law remains privileged or confidential unless and until introduced into evidence at an administrative hearing or in a court of competent jurisdiction.* (Emphasis added).

You do not argue that any specific portion of the records at issue are either privileged or confidential. You have, however, pursuant to section 552.305 of the Government Code, elected to allow representatives of National Group to submit to this office arguments as to how the requested information implicates National Group’s proprietary interests. In so doing, National Group has invoked the protection of section 552.110 of the Government Code, which protects, among other things, confidential “trade secret” information.

There are six factors to be assessed in determining whether information qualifies as a trade secret.² We believe that National Group has established a *prima facie* case that

(Footnote continued)

withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

²These six factors are

1) the extent to which the information is known outside of [the company’s] business; 2) the extent to which it is known by employees and others involved in [the company’s] business; 3) the extent of measures taken by [the company] to guard the secrecy of the information; 4) the value of the information to [the company] and to [its] competitors; 5) the amount of effort or money expended by [the company] in developing this information; and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757 comment b (1939); *see also* Open Records Decision No. 232 (1979), *supra*.

the names of its clients constitutes a "trade secret" and thus must be withheld from the public pursuant to section 552.110 of the Government Code. *See* Open Records Decision No. 552 (1990). However, National Group has not established that any other information contained in their responses to the article 1.24 inquiries is similarly protected, nor is such apparent to this office. Accordingly, we conclude that only those portions of the records at issue that reveal the identity of National Group clients are confidential under section 552.110 and thus must be withheld in accordance with article 1.24 of the Insurance Code.

We next address your section 552.103 arguments. To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* You contend that section 552.103(a) applies in this instance because

[t]his information relates to an ongoing investigation of National Group for alleged violations of state insurance laws. It is anticipated that this investigation will culminate in an administrative contested case against National Group as a party.

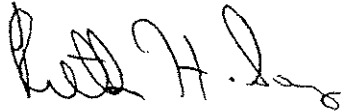
Based on your representation that the department anticipates "an administrative contested case against National Group," we conclude that section 552.103(a) is applicable in this instance.

We note, however, that National Group has had prior access to many of the records at issue. Absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). There is no justification for now withholding any of the correspondence between the department and National Group, or any attachments thereto, from the requestor pursuant to section 552.103(a). Accordingly, we conclude that the department may withhold pursuant to section 552.103(a) only those records that have not been seen or whose contents have not been previously revealed to representatives of National Group.³

³Because section 552.111 would apply only to those records otherwise excepted from public disclosure under section 552.103, we need not further discuss the applicability of that exception here.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', with a stylized flourish at the end.

Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/RWP/rho

Ref.: ID# 36010

Enclosures: Submitted documents

cc: Mr. Michael A. Iglesias, Chtd.
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(w/o enclosures)